United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: November 25, 2003

TO : Earl L. Ledford, Acting Regional Director
Region 9

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: E.I. DuPont DeNemours-Louisville Works 596-0420-0100
Case 9-CA-40262 596-0420-5000
596-0420-5050
596-0420-5500

This case was submitted for advice as to whether the charge alleging that the Employer unilaterally implemented changes to its employee health care plan was filed outside the 10(b) period. We conclude that the charge was filed outside the 10(b) period because the Union received clear and unequivocal notice, more than six months before the charge was filed, that the Employer had implemented changes to the health care plan.

FACTS

E.I. DuPont DeNemours-Louisville Works (the Employer) and the PACE International Union and Local 5-2202 (the Union) have a longstanding bargaining relationship. Since 1995, the Employer has maintained a national benefit plan, the BeneFlex Plan, which allows employees to make selections from a variety of benefits including health care, investment plans, life insurance, and extra vacation. The employees' costs and the precise benefits available have varied from year-to-year because the plan includes provisions that give the Employer the right:

> (1) to determine the price of coverage; (2) to control and manage the operation and administration of the Plan; and (3) to change or discontinue the plan without prior negotiation with the Union.

The most recent contract between the parties expired in February 2002 and the parties began bargaining for a new contract at that time.[1] In August 2002,[2] the Employer announced to its employees that it was changing the health

[1] The parties have yet to reach an agreement on a new contract.

[2] Hereafter all dates are in 2002 unless otherwise noted.

care plan for 2003 by, among other things, eliminating the old "network" option and replacing it with a new "point-of-service" option. The Employer used e-mail to present each employee, including the Union's officers and negotiating committee members, with a personalized description of the changes to each's health benefits and premiums.

On October 24, the Union and Employer briefly discussed the announced changes to the health care plan, at which time the Employer took the position that it had the right to unilaterally make changes to the existing plan. On that same date, by letter, the Union's chief negotiator notified the Employer that any changes to the health care plan were subject to good faith bargaining and that the Employer could not rely on management rights provisions in the contract or plan because the collective-bargaining agreement had expired.[3]

In spite of the Union's October 24 letter, the Employer held its "open period" for benefit registration, under the modified health care plan, from November 4 through November 15, at which time each employee received written confirmation of his or her selections and the costs. The confirmation also included a reminder that any errors had to be corrected during the "correction period," November 18 through November 22, or the benefits listed in the confirmation would become effective January 2, 2003. The Employer also announced, via e-mail, that all employees currently enrolled in the "eliminated option" who did not select another option would automatically default to the "new option."

By letter on November 21, the Employer's chief negotiator responded to the Union's October 24 letter by stating that the terms of the health care plan gave the Employer the right to implement changes and that bargaining over the announced changes would be "wholly inappropriate." The Employer stated that it would be willing to bargain over a new or different health care plan if the Union proposed one. On November 27, by letter, the Union rejected the Employer's November 21 response and added: "[i]t is clear that, prior to your response, [the Employer] proceeded with the implementation of changes in the BeneFlex Plan for 2003." The Union also made an on going request to bargain in spite of the Employer's alleged unlawful conduct. On

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[3] The Region has determined that Complaint should issue if the charge was timely filed, since the Employer could not unilaterally change the benefits after the expiration of the contract and before impasse in negotiations.

December 19, the Employer declined to bargain over the changes announced in October.

On January 1, 2003, the new changes when into effect. On June 2, 2003, the Union filed the instant charge. Therefore, in evaluating the Employer's 10(b) defense, we must determine whether the violation alleged in that charge occurred prior to December 2.

ACTION

We conclude that the charge was filed outside the 10(b) period because the Union received clear and unequivocal notice, more than six months before the charge was filed, that the Employer had implemented changes to the health care plan.

The Board has held that the Section 10(b) limitations period begins to run from the date of "unequivocal notice" that an actionable violation has occurred.[4] In the context of employer unilateral changes, unconditional and unequivocal announcement of such a change is sufficient to commence the 10(b) period, even though the consequences of that decision would occur at a future date.[5]

Here, although the Employer announced its intention to change the health care plan in August, the Employer's

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[4] A & L Underground, 302 NLRB 467, 470 (1991) (union received letter from respondent repudiating any agreement with union; union had clear and unequivocal notice therefore must file charge within 6 months of such total repudiation). Compare Newark Morning Ledger, 311 NLRB 1254 (1993) (letter stating employer's "present intention" to implement a program in the summer held not sufficient to start 10(b) period, where the letter invited the union to contact the employer, because the letter had not announced a "final decision."); Stage Employees IATSE Local 659 (Paramount Pictures), 276 NLRB 881, 882 (1985) (union announced intention to advise employer of delinquent dues if the employee failed to pay by a future date; notice found to be "conditional" and therefore insufficient to commence 10(b) period).

[5] 302 NLRB at 469 ("Respondent sent a letter that severed the bargaining relationship in one stroke, and failure to apply the contract thereafter is little more than the effect or result of that action"). See generally, Postal Service Marina Processing Center, 271 NLRB 397 (1984) (alleged discriminatory discharge to be effective after employee was told of final decision).

conduct at that point arguably was not actionable. The Employer presented the changes to its employees as a possibility, and continued to discuss the changes with the Union as late as October 24. However, by November 4, and certainly no later than November 21, the Union had clear and unequivocal notice that the Employer's intentions had been acted upon. Beginning November 4, the Employer required employees to make selections for health care based upon the changed plan, held open meetings for the employees to register for the changed plan, and provided them with written confirmation of their selections under the changed plan. Finally, on November 21, the Employer told the Union that it had the right to make these changes to the health care plan and indicated that it had implemented the changes. Indeed, the Union acknowledged in its November 27 letter "[i]t is clear that, prior to your response, [the Employer] proceeded with the implementation of changes in the BeneFlex Plan for 2003." Thus, we conclude that, by November 21 at the latest, the Union had clear and unequivocal notice that the Employer had committed an actionable violation.

Furthermore, the Employer's conduct in November created a material, substantial, and significant change in the employees' terms of employment.[6] Thus, the Employer's insistence that employees in the old "network option" select a new option or default to the new "point-of-service option" clearly changed terms of employment, although the employees did not experience the consequences of the change until January 2003. At no time after the Employer started its enrollment process did it take any action that was inconsistent with its implementation of the plan.[7]

The Union asserts that the Employer, in its November 21 letter, did not clearly and unequivocally refuse to bargain but merely stated that bargaining over the current changes was "wholly inappropriate" and that it was willing to bargain over a new or different health care plan if the Union proposed one. However, the Employer's letter also clearly stated that it would not bargain about the changes at issue, which are the only actions constituting an

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[6] See Brimar Corp., 334 NLRB 1035 (2001) (signing of a new form by employees holding them accountable for production requirements was a material, substantial, and significant change in their terms and conditions of employment).

[7] Compare Chinese American Planning Council, 307 NLRB 410 (1992) (employer's announcement that tenure would end on a future date did not indicate "unequivocal" decision because employer's subsequent conduct indicated a later date, and an employer statement characterized the initial date as a "proposed schedule").

actionable violation if the Employer was not privileged to make them unilaterally.

Accordingly, absent withdrawal, the charge alleging that the Employer unlawfully implemented changes to its health plan without bargaining with the Union should be dismissed because it was filed outside the 10(b) period.

B.J.K.